

The relief sought now in a preliminary hearing is “the treatment and referrals recommended by Dr. Poppa” in a report of February 26, 2008. These included orthopedic consultation by Dr. Beall for her current symptoms and with a physiatrist, directed at “Ms. Jackson’s physical condition involving her shoulder, neck and upper back”.

If Dr. Beall is not a satisfactory referee to either party, another specialist should be agreed by them for such a referral.¹

Respondent and its insurance carrier (respondent) contend Judge Foerschler erred. They contend:

1. The Judge exceeded his jurisdiction by entering the Temporary Order before the 10 days had expired that the Judge had given the parties to brief the issues.
2. The Judge exceeded his jurisdiction by awarding medical compensation without first applying a credit from the Missouri settlement, which far exceeds the amount that can be awarded in Kansas.
3. Respondent is denied due process unless the Board reviews the Temporary Order as claimant will probably never take the claim to regular hearing and an award “if she enjoys the benefits of continued non-reviewed orders for ongoing medical treatment”² Respondent argues claimant’s present request should not be addressed in a preliminary hearing as claimant has settled her claim in Missouri, the parties have been through a prehearing settlement conference, and claimant has been rated, declared at maximum medical improvement numerous times, and released from medical care numerous times.
4. The medical treatment that claimant now requests for her right shoulder is not related to her May 12, 1998, accident but, instead, the direct result of an unrelated left wrist fracture.

In short, respondent requests the Board to reverse the May 21, 2008, Temporary Order and deny claimant’s request for additional medical benefits.

¹ ALJ Temporary Order (May 21, 2008) at 2.

² Respondent’s Brief at 2 (filed June 30, 2008).

Conversely, claimant contends the Temporary Order should be affirmed. Claimant first argues the Board lacks jurisdiction to review respondent's contention that it should be credited for the Missouri settlement. In the alternative, claimant asserts that respondent's request for a credit for disability payments in excess of the Kansas statutory cap has no basis. Next, claimant argues respondent has provided no evidence that claimant has sustained an intervening trauma or injury to her right shoulder and, therefore, the Board lacks jurisdiction to review that issue. In the alternative, claimant argues her present right shoulder symptoms are identical to those she has experienced since her accident and that is established by both her testimony and the medical evidence.

In summary, the issues before the Board on this appeal are:

1. Did the Judge err by issuing the Temporary Order before the period expired that the parties were given to brief the issues?
2. Does the Board have jurisdiction at this juncture of the claim to review the issue of whether claimant's present need for medical treatment is related to her May 12, 1998, accident? If so, did claimant satisfy her burden of proof or, instead, did respondent prove the requested medical treatment is related to an intervening incident?
3. Does the Board have jurisdiction at this juncture of the claim to review the issue of whether respondent, due to the Missouri settlement, is entitled to receive a credit against any liability and responsibility it may have under the Kansas Workers Compensation Act to provide medical treatment? If so, did the Judge exceed his jurisdiction or otherwise err by awarding claimant medical compensation without first applying a credit for the Missouri settlement?
4. In the event the Board should find it does not have jurisdiction under K.S.A. 44-534a to review the credit issue raised by respondent in this appeal, should the Board otherwise address that issue to avoid denying respondent due process?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned Board Member finds and concludes:

On May 12, 1998, claimant injured her right arm and shoulder while working for respondent when a 35- to 50-pound box slipped that she was placing on a shelf. Claimant's treatment initially focused upon her right shoulder. Later, claimant underwent an MRI, which revealed a herniated disc in her thoracic spine.

Claimant ultimately underwent two surgeries on her right shoulder and a discectomy and fusion in her upper back. In late 2001, claimant was released from medical treatment. And on December 19, 2003, she settled the Missouri workers compensation claim she had filed for this accident. Claimant gave up any right to seek additional medical benefits in that claim. Claimant testified that at the time of the settlement she had ongoing pain in her right upper extremity and numbness in her fingers and that her doctors were recommending additional medical treatment.

In late 2007 claimant fractured her left wrist. Claimant contends that injury caused her to use her right upper extremity more, which increased the ongoing pain in her right shoulder. Consequently, claimant applied for additional medical treatment in this claim.

On May 15, 2008, the parties appeared before Judge Foerschler to address claimant's request for medical treatment. At the hearing the Judge told the parties they would have 10 days to submit written argument.³ Nonetheless, the Judge issued the Temporary Order on May 21, 2008, before the 10-day period expired and before the parties had submitted their briefs.

The undersigned finds the Judge exceeded his jurisdiction and authority by entering the May 21, 2008, Temporary Order before the time had expired for the parties to submit their written arguments. Once the Judge granted the parties 10 days to submit their arguments, the Judge was likewise bound by the order. At first glance this miscue might appear rather innocuous. But this is an appeal from a preliminary hearing order issued under K.S.A. 44-534a and, consequently, the Board does not have jurisdiction over every issue that may arise from such an order.⁴

Nevertheless, the Board does have jurisdiction over a preliminary hearing issue when a Judge exceeds his or her jurisdiction.⁵ And in this instance the undersigned finds the Judge had granted the parties 10 days to provide their written arguments and, therefore, the Judge exceeded his jurisdiction by entering the Temporary Order before that 10-day period had expired. Accordingly, the Temporary Order should be set aside and this matter remanded to the Judge.

Based upon the above, the remaining issues are rendered moot.

³ Hearing Trans. (May 15, 2008) at 64-66.

⁴ See K.S.A. 44-534a(a)(2).

⁵ See K.S.A. 2007 Supp. 44-551(i)(2)(A).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned sets aside the May 21, 2008, Temporary Order and remands this claim to the Administrative Law Judge to address the issues presented. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Marcia Yates-Roberts, Administrative Law Judge

⁶ K.S.A. 44-534a.